

## Serious Racial and Religious Vilification in Victoria under the Criminal Law

The offences of serious racial and religious vilification involve intentional incitement to threaten or incite others to threaten physical harm or intentionally inciting serious contempt for or revulsion or severe ridicule of, that other person or class of persons: *Racial and Religious Tolerance Act 2001* (Vic) ss 24 and 25

The key elements are:

On the ground of race or religious belief or activity of another person or class of persons	(1) Intentionally engaging in conduct that the offender knows is likely	To incite hatred against that other person or class of persons	AND to threaten, or incite others to threaten physical harm	OR (2) knowingly engage in conduct with the intention of inciting	Serious contempt for, or revulsion or severe ridicule of	Other person or class of persons
In <i>Cottrell</i> , it was held that as the element 'on the ground of the religious belief or activity of the person or class of persons' is referable to the impact on the mind of the audience under s 8, the same phrase under s 25(2) should be referable to the	Section 24(1) provides that it is necessary for the prosecution to prove that the defendant intended to incite others to have the responses and to carry out the threats referred to. <sup>ix</sup>  It is not necessarily the view point of the offender that creates a criminal offence, but whether what the	If the likely effect of a person's conduct is 'hatred' then a prosecution would have to be brought under s 24(1) or s 25(1) and the conduct must include threats or incitement of others to threaten. <sup>xv</sup>  The word 'incites' should be	The effect of this element is to require some additional aggravating conduct, i.e threatening or else inciting others to threaten physical harm. <sup>xxii</sup> "It seems clear, by application of the general rules of law concerning the elements of criminal offences,	In <i>Cottrell</i> , it was held that intent under s 25(2) requires that the perpetrator intended to encourage the audience to be moved by his conduct to serious contempt (or other relevant emotion) by reason of the religious beliefs of	In <i>Cottrell</i> , Kid CJ held that the words 'serious contempt for, or revulsion or severe ridicule of' should be given their natural and ordinary meaning. <sup>xxxvii</sup> These words and phrases "describe the strongest possible (or extreme) feelings of dislike". <sup>xxxviii</sup> The	'Class' is not defined in the RRT Act. The natural or ordinary meaning of the phrase is that of a 'collection or group of persons who are regarded as having certain common attributes or traits.' <sup>xliiv</sup>  The RRT Act contemplates that

<p>intended impact on the mind of the audience.<sup>ii</sup></p> <p>Intent under s 25(2) requires that the perpetrator intended to encourage the audience to be moved by his conduct to serious contempt (or other relevant emotion) <b>by reason of</b> the religious beliefs of the victim group.<sup>iii</sup></p> <p>Kidd CJ stated: “It seems to me that once it is established that the perpetrator intended to encourage the audience to be moved by his conduct to serious contempt (or other relevant emotion) by reason of the</p>	<p>offender said incited or caused others to commit or threaten acts of violence against the victim and that the offender intended this to be the outcome.<sup>x</sup></p> <p>The parallel NSW provision, s 20D of the <i>Anti-Discrimination Act 1977</i> (NSW) has been repealed.</p> <p>The NSW Standing Committee on Law and Justice’s Report on Racial Vilification Law in NSW,<sup>xi</sup> considered some concerns “regarding the necessary mental state, or ‘mens rea’, required when proving incitement”.</p> <p>The NSW Standing Committee stated: “We acknowledge that the</p>	<p>interpreted in accordance with its plain and ordinary meaning – to urge, spur on, stir up, animate or stimulate.<sup>xvi</sup> It carries the connotation of ‘inflammation’ or set alight’.<sup>xvii</sup></p> <p>The term ‘hatred’, should be interpreted in accordance with its ordinary meaning.<sup>xviii</sup></p> <p>The vilification provisions are directed at conduct that is likely to ‘generate strong and negative passions in the ordinary person’, such as where persons are so affected that</p>	<p>that it is necessary for the prosecution to prove that the defendant intended to incite others to have the responses and to carry out the threats referred to.”<sup>xxiii</sup></p>	<p>the victim group.<sup>xxiv</sup></p> <p>He held the absence of an equivalent provision to s 9, which provides that motive is irrelevant to civil liability under the RRT Act, tends to show that motive is relevant to liability under s 25(2). Motive does not require proof that the accused did possess actual personal feelings of malevolence or animus towards the victim group or their beliefs.<sup>xxv</sup> However, sentiments such as these will ‘almost always accompany the requisite intention under s 25(2)’.<sup>xxvi</sup></p>	<p>criminal offence is ‘specified to apply only to the most extreme behaviour’ intended to cause those extreme feelings.<sup>xxxix</sup></p> <p>“Importantly, contempt is preceded by the qualifying words ‘serious’ and ‘ridicule’ is preceded by the word ‘severe’. Unlike the emotional response of ‘ridicule’ and ‘contempt’, there is no modifier for the emotion ‘revulsion’. It seems to me that this recognises that the severity or level of feelings of ‘ridicule’ or ‘contempt’ might vary, from slight to extreme. The</p>	<p>a class of persons may hold a religious belief or engage in religious activity.</p> <p>Muslims are clearly a group of people having an attribute in common, that is, people who follow or practice the religion of Islam; they hold religious beliefs and engage in religious activity.<sup>xlv</sup></p>
--	--	--	--	---	--	--

<p>religious beliefs of the victim group, it almost inevitably follows that the perpetrator was also so moved or actuated to engage in the conduct by reason of the religious beliefs of the victim group.<sup>iv</sup></p> <p>In <i>Cottrell</i> the appellant set out to act as he <b>did by reason of</b> the religious beliefs of Muslims. There was a causal connection between his engaging in the conduct in question (with the intention to incite) and his attitude towards Muslims.<sup>v</sup></p> <p>It was unnecessary for Kidd CJ to decide if motive</p>	<p>Attorney General in his Second Reading Speech considered that incitement should be intentional. However we also note the evidence from stakeholders that proving intent to incite is extremely difficult and poses a significant hurdle to prosecutions under s 20D.”<sup>xii</sup></p> <p>There were submissions to the Committee pointed out that there was uncertainty as to whether recklessness</p>	<p>violence may result.<sup>xix</sup></p> <p>It is necessary to consider the effect of the words or conduct on an ‘ordinary’ member of the class to which it is directed, taking into account the circumstances in which the conduct occurs.<sup>xx</sup></p> <p>To determine whether conduct ‘<b>incites</b>’ for the purposes of the RRTA, the conduct must be assessed ‘<b>as a whole</b>’.<sup>xxi</sup></p>		<p>The question is whether the accused ‘set out or was moved to act as he did because of the religious beliefs of the victim group’; the causal link is crucial.<sup>xxvii</sup></p> <p>In the present case, the appellant set out to act as he did by reason of the religious beliefs of Muslims.<sup>xxviii</sup> There was a causal connection between his engaging in the conduct in question (with the intention to incite) and his attitude towards Muslims and Kidd CJ did not have to decide “if motive must always be elementally attributed to the</p>	<p>emotion of ‘revulsion’ is different. By its very nature, ‘revulsion’ is already an extreme form of emotional response”.<sup>xi</sup></p> <p>Contempt is defined in the New Shorter Oxford English Dictionary, Oxford University Press (1993) as: 1 The action of scorning or despising; the mental attitude in which something or someone is considered as worthless or of little account. 2 The condition of being held worthless or of being despised; dishonour, disgrace. ... 4 A scornful or</p>	
---	---	--	--	--	--	--

<p>must always be elementally attributed to the perpetrator under s 25(2), because in this case it was made out.<sup>vi</sup></p> <p>‘Class’ is not defined in the RRT Act. The natural or ordinary meaning of the phrase is that of a ‘collection or group of persons who are regarded as having certain common attributes or traits.’<sup>vii</sup></p> <p>The RRT Act contemplates that a class of persons may hold a religious belief or engage in religious activity.</p> <p>Kidd CJ holds that “Muslims are</p>	<p>may be a sufficient mens rea and in response to difficulties with proving intent, a number of participants expressed the view that s 20D of the Anti-Discrimination Act should include a mens rea of recklessness.<sup>xiii</sup></p> <p>Although the Committee suggested legislative clarification, it expressed the view that recklessness is a sufficient form of criminal intent for the purposes of s 20D.<sup>xiv</sup></p> <p>This analysis would be applicable to the Victorian provisions.</p>			<p>perpetrator under s 25(2).”<sup>xxix</sup></p> <p>Incite means ‘urges, spurs on, stirs up, animates or stimulates’, or ‘encourage’.<sup>xxx</sup></p> <p>There can be no incitement in the absence of an audience<sup>xxxi</sup>. While actual incitement is not required here – intention to incite is sufficient – an intent to incite could only be proved if there was an intended audience.<sup>xxxii</sup></p> <p>Section 25(2) does not require that the conduct engaged in to be capable of inciting the targeted audience to the emotional responses stipulated<sup>xxxiii</sup>.</p>	<p>disrespectful act; esp. an act in contempt of a court of law. 5 An object of contempt.”<sup>xli</sup></p> <p>Revulsion is defined in the New Shorter Oxford English Dictionary, Oxford University Press (1993) as: ... 3 A sudden violent change of feeling; a strong reaction in taste; abhorrence, repugnance; a sense of loathing.<sup>xlii</sup></p> <p>Ridicule is defined in the New Shorter Oxford English Dictionary, Oxford University Press (1993) as: 1 A ridiculous or absurd thing, characteristic, or habit; an absurdity. Now rare. 2 Subjection</p>	
---	--	--	--	---	--	--

<p>clearly a group of people having an attribute in common, that is, people who follow or practice the religion of Islam. They hold religious beliefs and engage in religious activity.”<sup>viii</sup></p>				<p>Section 25(2) is concerned with the purported inciter’s state of mind or intention, and not with the consequential impact (of the conduct) upon the target audience.<sup>xxxiv</sup></p> <p>In <i>Cottrell</i>, Kidd CJ holds that in this case in the appellant’s act in the mock-beheading scene of the video, his acts “are deliberate and voluntary and that the appellant was aware that his participation was being filmed.”<sup>xxxv</sup></p> <p>He considers that it is ‘patently clear that the function of the video was to drum up</p>	<p>to mocking and dismissive language or behaviour; the action or practice of ridiculing a person or thing; mockery, derision. 3 Ridiculous nature or character (of a thing), ridiculousness; that which is ridiculous. 4 A piece of derisive mirth or light mockery. ridicule / v.t. Subject to ridicule or mockery; make fun of, deride, laugh at. Formerly also (rare), make ridiculous.<sup>xlili</sup></p>	
---	--	--	--	---	---	--

				support for the rally or protest. The mock-beheading video was purposeful. It was calculated to achieve a result. It was pre-meditated and involved a degree of planning. It was undertaken with serious intent. This is the important context to my other findings.” <sup>xxxvi</sup>		
--	--	--	--	--	--	--

---

<sup>i</sup> *Cottrell v Ross* [2019] VCC 2142.

<sup>ii</sup> *Ibid*, [48].

<sup>iii</sup> *Ibid*, [49].

<sup>iv</sup> *Ibid*, [51].

<sup>v</sup> *Ibid*, [63].

<sup>vi</sup> *Ibid*, [56].

<sup>vii</sup> *Ibid*, [40].

<sup>viii</sup> *Ibid*, [63].

<sup>ix</sup> Neil Rees, Simon Rice and Dominique Allen ‘Australian anti-discrimination and equal opportunity law’ (The Federation Press, 3<sup>rd</sup> ed, 2018), 742; citing *Veloskey v Karagiannakis* [2002] NSWADTAP 18, [22].

<sup>x</sup> Racial Vilification and Racially Motivated Offences [2010] TASLRIP 16, [3.2.4] ([https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/TASLRIP/2010/16.html?context=1;query=%22Anti-Discrimination%20Act%201977%22%20and%20%22s%2020D%22;mask\\_path=](https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/TASLRIP/2010/16.html?context=1;query=%22Anti-Discrimination%20Act%201977%22%20and%20%22s%2020D%22;mask_path=)).

<sup>xi</sup> Standing Committee on Law and Justice, Report on Racial vilification law in NSW (NSW Legislative Council, Report 50, 2013) (<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2260/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final.pdf>), [4.88].

<sup>xii</sup> *Ibid*, [4.106].

- 
- xiii Ibid, [4.95].
- xiv Ibid, [4.107].
- xv Ibid, 743.
- xvi [Catch the Fire Ministries Inc v Islamic Council of Victoria Inc \[2006\] VSCA 284](#), [14] (Nettle JA), [159] (Neave JA) ('Catch the Fire').
- xvii *Fletcher v Salvation Army* [2005] VCAT 1523, [5].
- xviii Rees et al (ix), 734.
- xix [Fletcher](#) (xvii) [5].
- xx Rees et al (ix) 734.
- xxi *Catch the Fire (nxvi)* [79] (Nettle JA); [191]-[192] (Neave JA).
- xxii Rees et al (ix) 742.
- xxiii Ibid; citing *Veloskey v Karagiannakis* [2002] NSWADTAP 18, [22].
- xxiv *Cottrell* (i) [47].
- xxv Ibid, fn 37.
- xxvi Ibid.
- xxvii Ibid.
- xxviii Ibid, [56].
- xxix Ibid, fn 37.
- xxx Ibid, [57].
- xxxi Ibid.
- xxxii Ibid.
- xxxiii Ibid, [58].
- xxxiv Ibid, [58].
- xxxv Ibid, [311].
- xxxvi Ibid, [322].
- xxxvii Ibid, [36].
- xxxviii Ibid.
- xxxix Ibid.
- xl Ibid, [37].
- xli Ibid, fn 25.
- xlii Ibid, fn 26.
- xliiii Ibid, fn 27.
- xliv Ibid, [40].
- xlvi Ibid, [63].